Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term, 1995

JOHN J. METCALFE, III,

Petitioner,

v.

CYNTHIA U. KELLY,
f/k/a CYNTHIA U. METCALFE,

Respondent.

On Petition for Writ of Certiorari
To the Court of Appeal of Florida,
Third District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the refusal in child custody modification proceedings to permit Mr. Metcalfe to obtain discovery from the court-appointed guardian ad litem regarding the report and recommendations of the guardian ad litem, which was based almost entirely on hearsay statements of individuals whose identity was not made known to Mr. Metcalfe, as well as on reports provided to the guardian ad litem by unknown sources, where the court expressed a heavy reliance on such report and recommendations to change custody of the minor children of the parties to Mrs. Kelly, deprived Mr. Metcalfe of his right to a fair and impartial trial in open court, in violation of Mr. Metcalfe's constitutional rights of due process and equal protection, as guaranteed by the Fourteenth Amendment to the United States Constitution.

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CITATION OF OPINIONS BELOW

Mr. Metcalfe seeks review of the decision of the Court of Appeal of Florida, Third District, affirming the judgment entered by the Circuit Court of the Eleventh Judicial Circuit of Florida, Family Division, changing custody of the minor children of the parties to their mother. The opinion of the Court of Appeal of Florida, Third District, was reported as *Metcalfe v. Metcalfe*, 655 So.2d 1251 (Fla. 3d DCA 1995) and is attached as Appendix A; the judgment of the Circuit Court of the Eleventh Judicial Circuit of Florida, Family Division, was entered by the court on September 30, 1993, under case number 87-16363 (FC 07), and is attached as Appendix B.

JURISDICTION

On May 31, 1995, the Court of Appeal of Florida, Third District, affirmed the judgment entered on September 30, 1993, by the Circuit Court of the Eleventh Judicial Circuit of Florida, Family Division, changing custody of the minor children of the parties to their mother, the Respondent herein. On October 11, 1995, the Supreme Court of Florida declined to accept discretionary jurisdiction to review the decision of the Court of Appeal. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Fla. Stat. § 61.403 (Supp. 1990) provides as follows:

"61.403. Guardians ad litem; powers and authority.

A guardian ad litem when appointed shall act as a representative of the child and shall act in the child's best interest. A guardian ad litem shall have the powers, privileges, and responsibilities to the extent necessary to advance the best interest of the child, including, but not limited to, the following:

(1) The guardian ad litem may investigate the allegations of the pleadings affecting the child, and, after proper notice to interested parties to the litigation and subject to conditions set by the court, may interview the child, witnesses, or any other person having information concerning the welfare of the child.

(2) The guardian ad litem, through counsel, may petition the court for an order directed to a specified person, agency, or organization, including, but not limited to, hospitals, medical doctors, dentists, psychologists, and psychiatrists, which order directs that the guardian ad litem be allowed to inspect and copy any records and documents which relate to the minor child or to the child's parents or other custodial persons or household members with whom the child resides. Such order shall be

obtained only after notice to all parties and hearing thereon.

(3) The guardian ad litem, through counsel, may request the court to order expert examinations of the child, the child's parents, or other interested parties in the action, by medical doctors, dentists, and other providers of health care including psychiatrists, psychologists, or other mental health professionals.

(4) The guardian ad litem may assist the court in obtaining impartial expert examinations.

(5) The guardian ad litem may address the court and make written or oral recommendations to the court. The guardian ad litem shall file a written report which may include recommendations and a statement of the wishes of the child. The report must be filed and served on all parties at least 20 days prior to the hearing at which it will be presented unless the court waives such time limit. The guardian ad litem must be provided with copies of all pleadings, notices, and other documents filed in the action and is entitled to reasonable notice before any action affecting the child is taken by either of the parties, their counsel, or the court.

(6) A guardian ad litem, acting through counsel, may file such pleadings, motions, or petitions for relief as the guardian ad litem deems appropriate or necessary and may request and provide discovery. The guardian ad litem,

through counsel, is entitled to be present and to participate in all depositions, hearings, and other proceedings in the action, and, through counsel, may compel the attendance of witnesses.

(7) The duties and rights of non-attorney guardians do not include the right to practice law.

(8) The guardian ad litem shall submit his recommendations to the court regarding any stipulation or agreement, whether incidental, temporary, or permanent, which affects the interest or welfare of the minor child, within 10 days after the date such stipulation or agreement is served upon the guardian ad litem."

Fla. Stat. § 61.403 (Supp. 1990) provides as follows:

"61.404. Guardians ad litem; confidentiality.

The guardian ad litem shall maintain as confidential all information and documents received from any source described in Sec. 61.403(2) and may not disclose such information or documents except, in the guardian ad litem's discretion, in a report to the court, served upon both parties to the action and their counsel or as directed by the court."

STATEMENT OF THE CASE

Mr. Metcalfe appealed to the District Court of Appeal of Florida, Third District, the final judgment entered by the Circuit Court of the Eleventh Judicial Circuit of Florida, granting Cynthia U. Kelly's petition for modification of child custody, which changed the custody of the minor children of the parties to Mrs. Kelly. Mr. Metcalfe also appealed the post-judgment order entered by the trial court, awarding fees to the guardian ad litem.

The parties were divorced on January 27, 1988, when their twin boys were approximately 18 months old. Pursuant to the "Property Settlement Agreement" entered into by the parties, Mrs. Kelly agreed that the primary physical residence of their minor children should be with Mr. Metcalfe.

In October, 1991, however, Mrs. Kelly sought a modification of the original agreement, seeking to have the primary physical residence of the children changed to hers and simultaneously sought and obtained an order appointing a guardian ad litem for the minor children. During the course of the modification proceedings, the guardian ad litem interviewed a number of people, including the parties and the children, and received additional information from undisclosed sources.

During the pre-trial portion of the proceedings, Mr. Metcalfe attempted to obtain discovery from the guardian ad litem, regarding all information obtained by the guardian ad litem in preparing his report and recommendations, including the identities of all persons whose statements were taken by the guardian ad litem.

When the guardian ad litem objected, Mr. Metcalfe moved for an order compelling the guardian ad litem to provide the discovery arguing, among other things, that the Florida statute requirement that the guardian ad litem maintain all information confidential, could only be interpreted as a requirement that the information be kept confidential as to third parties, but not as to the parents of the minor children, given the weight that such report would obviously carry with the court. The trial court, however, denied Mr. Metcalfe's motion, thereby prohibiting Mr. Metcalfe from obtaining any discovery from the guardian ad litem.

The guardian ad litem ultimately issued his report and recommendation, opining that the custody of the minor children should be changed to that of Mrs. Kelly.

The evidence at trial as to whether there had been a material change in circumstances which would require that the children's primary physical residence be changed to that of Mrs. Kelly, was conflicting at best. It can be said that the trial court had before it a combination of two types of evidence: On the one hand, the partisan testimony of Mrs. Kelly's and Mr. Metcalfe's witnesses (including the directly contradicting testimony of the respective mental health experts of either side). On the other, the impartial testimony of the court-appointed psychologist, who opined against a change of custody, as it would not be in the best interests of the children (then 6½ years old) to be removed from their home with Mr. Metcalfe, where they had lived since they were still in diapers.

The latter evidence notwithstanding, as the trial

court acknowledged in the final judgment, the recommendation of the guardian ad litem was one of the most, if not the most influential factor in the trial court's decision. As a result, the judgment changing custody of the children to Mrs. Kelly was entered by the trial court on September 30, 1993.

Mr. Metcalfe timely filed a Motion for Rehearing (Appendix D) arguing, among other things, that Mr. Metcalfe's rights to due process and the equal protection of the laws under the Florida and United States constitutions were violated, given that the guardian ad litem was able to render a report and recommendations to the court, without affording Mr. Metcalfe an opportunity to prepare any defense to such report and recommendation, or even to find out the specific premises upon which the conclusions reached by the guardian ad litem were based. Mr. Metcalfe argued that such questions as: Doing what types of things did the guardian ad litem devote countless hours? Who and what were the sources of information relied upon by the guardian ad litem in formulating his opinion? What was the quality of that information? What was the reliability of any statements and other information obtained by the guardian ad litem? What significant and material sources or factors did the guardian ad litem fail to consider or simply ignore? and, How impartial was the guardian ad litem's report and recommendations to the court?, were all relevant and important questions, the answers to which Mr. Metcalfe had a right to receive under the due process and equal protection clauses of the Florida and United States constitutions.

Mr. Metcalfe's motion for rehearing, was

summarily denied on October 13, 1993. (Appendix E).

Mr. Metcalfe then appealed the final judgment to the District Court of Appeal of Florida, Third District, arguing, one more time, that his constitutional right to due process had been violated by the trial court's refusal to permit him to obtain discovery regarding the report and recommendations of the guardian ad litem. (An excerpt from Mr. Metcalfe's Initial Brief, raising the constitutionality issue, is attached as Appendix C). In affirming the trial court, the Third District Court of Appeal of Florida held that:

a) no due process violation had been shown by the trial court's refusal to allow Mr. Metcalfe to obtain discovery from the guardian ad litem;

b) *Hill v. Hill*, 371 So.2d 573 (Fla. 1st DCA 1979) was inapplicable to this case because *Hill* involved a home study report as to which no privilege existed concerning the information upon which the report was based;

c) the trial court had inherent authority to award a reasonable fee to the guardian ad litem; and

d) substantial competent evidence had been adduced at trial to support a change of child custody. (The opinion of the Court of Appeal of Florida, Third District, is attached as Appendix A.).

Consequently, Mr. Metcalfe filed his Notice of Appeal, invoking the discretionary jurisdiction of the Supreme Court of Florida again arguing that his due

process rights had been denied by the Third District Court of Appeal's interpretation of Fla. Stat. §§ 61.403 (Supp. 1990) and 61.404 (Supp. 1990). The Supreme Court of Florida declined to accept jurisdiction by order entered October 11, 1995.

The instant Petition followed.

REASONS FOR GRANTING THE WRIT

The interpretation by the Florida courts of Fla. Stat. §§ 61.403 (Supp. 1990) and 61.404 (Supp. 1990), as prohibiting the parents of minor children from obtaining discovery from the court-appointed guardian ad litem for the children, so as to ascertain the sources of information relied upon by the guardian ad litem in formulating his opinion, the quality of such information; the reliability of any statements obtained by the guardian ad litem, and the significant and material sources or factors which the guardian ad litem either did not consider, or merely ignored, on the grounds that the statute required the guardian ad litem to maintain all information received as confidential, thereby precluding the parents from adequately preparing to contradict the report and recommendations of the guardian ad litem, deprived the parents of a fair and impartial trial in open court, and consequently, denied the parents their rights to due process and equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution.

ARGUMENT

The holding of the Florida courts in this case that no due process violations occurred when Mr. Metcalfe was prohibited from obtaining discovery from the guardian ad litem, conflicts with the decisions of the majority of the courts of last resort of other states, which have generally held or recognized that there is a right to cross examine an investigator whose report is used by the court in making a child custody decision. *See*, *Bass v. Bass*, 437 P.2d 324 (Alaska 1968); *Syphrit v. Turner*, 446 So.2d 626 (Ala. Civ. App. 1983), *cert. denied*, Mar. 2, 1984, Ala. Sup. Ct. 83-409; *Roberts v. Roberts*, 226 S.W.2d 579 (Ark. 1950); *Fewel v. Fewel*, 144 P.2d 592 (Cal. 1943); *Anderson v. Anderson*, 445 P.2d 397 (Colo. 1968)(en banc); *Moody v. Gilbert*, 69 S.E.2d 874 (Ga. 1952); *Daitoku v. Daitoku*, 39 Haw. 276 (1952); *Yearsley v. Yearsley*, 496 P.2d 666 (Idaho 1972); *State ex rel Fisher v. Devins*, 200 N.W.2d 28 (1972); *Re Marriage of Kramer*, 580 P.2d 439 (Mont. 1978); *Thorlaksen v. Thorlaksen*, 453 N.W.2d 770 (N.D. 1990); *Malone v. Malone*, 591 P.2d 296 (Okla. 1979); *Schmitz v. Schmitz*, 351 N.W.2d 143 (S.D. 1984); *Rohrbaugh v. Rohrbaugh*, 68 S.E.2d 361 (W. Va. 1951); *Larson v. Larson*, 140 N.W.2d 230 (Wis. 1966).

In *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972), another due process case, this court also found that an unwed father was entitled to a hearing concerning his fitness as a parent, before his minor children could be taken away from him following the death of his wife, the children's mother. In *Stanley*, the Illinois statute arbitrarily made an unwed father automatically unfit to raise his children.

The situation presented in this case is as arbitrary as that presented to this court in *Stanley*. Here, it can be said at worst that the only presumably impartial testimony before the court was that of the court-appointed psychologist, who testified that it would not be in the best interests of the children to be removed from the home of their father, where they had been living pursuant to the agreement of the parties, since they were in diapers. Yet, the trial court opted to ignore that expert recommendation and instead, relied heavily on the report and recommendations of the guardian ad litem, an attorney who possessed no training in mental health, sociology, or other comparable training, and whose report was based almost entirely upon hearsay statements of individuals and on secret sources of information, none of which Mr. Metcalfe was allowed to review or cross examine.

This result is surprising, considering that the Florida Supreme Court in *Kern v. Kern*, 333 So.2d 17 (Fla. 1976) found that, implicit in Fla. Stat. § 61.20 (1969), was a procedural due process requirement that when the trial court relied on investigative reports in the determination of the child custody issue, the parties had a right to call as witnesses the case worker who prepared the report and the persons whom he or she interviewed. It is astonishing, then, that while in *Kern*, the Florida Supreme Court found a due process right of cross examination of a trained case worker in a child custody proceeding regarding the report issued by the case worker, the same requirement would not be found to be applicable to an untrained guardian ad litem when issuing a similar report to the court, merely because the statute under which the latter was appointed, required that the guardian ad litem hold all information obtained as

confidential.

Mr. Metcalfe would argue that, in interpreting Fla. Stat. §§ 61.403 and 61.404, as allowing a guardian ad litem to issue a report and recommendation to be heavily relied upon by the court under such a secrecy veil, the Florida courts deny, not only the parents, but also the children, the right to an impartial and fair trial and this, in Mr. Metcalfe's opinion, violates the Fourteenth Amendment to the United States Constitution; is contrary to the decisions of the majority of jurisdictions, and should be corrected by this Honorable Court.

CONCLUSION

Mr. Metcalfe suffered the loss of the custody of his children, not because there had been a substantial or material change in circumstances, as required by Florida law for a custody modification but rather, as the obvious result of the recommendations of a guardian ad litem whose report and recommendation Mr. Metcalfe was unable to contradict in any fashion. By relying so heavily on a guardian ad litem's report which was so veiled in secrecy, a report and recommendation that was contrary even to the opinion of two mental health experts - the court-appointed psychologist and the father's expert, a well known and well respected child psychiatrist - the trial court substituted its judgment for that of the guardian ad litem and the combination of all of these factors violated Mr. Metcalfe's right of due process and equal protection of the laws. This Honorable Court, therefore, should grant certiorari in this matter to review the decision of the Florida Court of Appeal, Third District.

Respectfully submitted,

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APPENDIX

A. Opinion of the Court of Appeal of Florida, Third District.

B. Judgment of the Circuit Court of the Eleventh Judicial Circuit of Florida, Family Division.

C. Excerpts of Mr. Metcalfe's Initial Brief in the District Court of Appeal of Florida, Third District, Pages 16-23 and 50.

D. Post trial Motion for Rehearing filed by Mr. Metcalfe on October 12, 1993, in the Circuit Court of the Eleventh Judicial Circuit In And For Dade County, Florida, Family Division, under case number 87-16362 (FC 07).

E. Order entered on October 13, 1993, in the Circuit Court of the Eleventh Judicial Circuit In And For Dade County, Florida, Family Division, under case number 87-16362 (FC 07), denying Mr. Metcalfe's Motion for Rehearing .

APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

January Term, A.D., 1995

No. 93-2411
94-70

JOHN J. METCALFE,

Appellant,

vs.

CYNTHIA U. METCALFE,

Appellee.

Opinion filed May 31, 1995.

An appeal from the Circuit Court of Dade County, Bernard S. Shapiro, Judge.

David A. Donet; Elser Greene, Hodor & Fabar, and Cynthia Greene, for appellant.

Paul R. Marcus, for appellee.

Before HUBBART and COPE and GREEN, JJ.

PER CURIAM.

This is an appeal by the husband John J. Metcalfe from a final order granting the wife's motion to change the custody of the parties' two minor children from the husband to the wife Cynthia U. Metcalfe which was entered below after a non-jury trial. We reject the points on appeal raised by the husband and affirm.

First, the trial court did not err, as urged, in denying the husband's discovery requests to the guardian ad litem appointed by the court for the two minor children. The requested material consisted of documents, reports and information obtained from third parties in connection with the guardian's investigation of this case. Section 61.404, Florida Statutes (1993), provides that a "guardian ad litem shall maintain as confidential all information and documents received from any source described in s. 61.403(2) and may not disclose such information or documents except, in the guardian ad litem's discretion, in a report to the court, served upon both parties to the action and their counsel or as directed by the court." Section 61.403(2), in turn, describes the following sources: "a specified person, agency, or organization, including, but not limited to, hospitals, medical doctors, dentists, psychologists, and

psychiatrists..." [1] It accordingly follows (1) that the guardian ad litem must maintain as confidential "all information and documents" received from these sources in connection with the guardian's investigation of the case, except that in the guardian's discretion, a report containing the substance of such information received may be filed by the guardian with the court and served on the parties... [2] and (2) that the trial court properly denied the husband's discovery request to obtain such

---

[1] Section 61.403(2), Florida Statutes (1993) provides as follows:

> "(2) The guardian ad litem, through counsel, may petition the court for an order directed to a specified person, agency, or organization, including, but not limited to, hospitals, medical doctors, dentists, psychologists, and psychiatrists, which order directs that the guardian ad litem be allowed to inspect and copy any records and documents which relate to the minor child or to the child's parents or other custodial persons or household members with whom the child resides. Such order shall be obtained only after notice to all parties and hearing thereon."

[2] The Senate Judiciary Civil Committee's staff analysis of the bill, which ultimately became Section 61.404, Florida Statutes (1993), confirms that "[a]ny records obtained from doctors, psychiatrists, hospitals, etc., would be kept confidential and the information could only be released in the guardian ad litem's report to the court." Senate Judiciary Civil Committee of Florida, Staff Analysis on S.B. 110, at 2 (February 2, 1990).

information and documents from the guardian ad litem in this case.

Contrary to the husband's argument, no due process violation has been shown by this procedure. The guardian ad litem filed and served on the parties and their counsel a report concerning his investigation and recommendations in this case. In the report, he disclosed all of the people he had interviewed in connection with this case so that the husband was free to interview or depose any of these people. Moreover, we think *Hill v. Hill*, 371 So.2d 573 (Fla. 1st DCA 1979), relied on by the husband, in inapplicable to this case because *Hill* involved a "home study" report as to which no privilege existed concerning the information upon which the report was based; in the instant case, however, a statutory privilege exists as to the information and reports upon which the guardian based the report filed and served below.

Second, there was substantial, competent evidence adduced below supporting the change of custody ordered by the trial court. This evidence tended to show that there has been a substantial and material change of circumstances since the final judgment of marriage dissolution of such magnitude that it would be detrimental for the children to remain in the custody of the husband, and that the best interests of the children would be promoted if the wife, who has since remarried, obtained custody of the children. *See Spradley v. Spradley*, 335 So.2d 822 (Fla. 1976); *Mulford v. Sullivan*, 467 So.2d 1093 (Fla 1st DCA 1985); *McIntyre v. McIntyre*, 452 So.2d 14, 19 (Fla. 1st DCA 1984); *see also Ritsi v. Ritsi*, 160 So.2d 159, 164 (Fla. 3d DCA 1964).

Finally, there is no merit to the remaining points on appeal raised by the husband. In particular, the trial court had the inherent authority to appoint and award a reasonable fee to the guardian ad litem in this case. *Green v. Green*, 230 So.2d 492 (Fla 3d DCA 1970) (court order requiring husband to pay fees to the court appointed guardian ad litem for parties' four minor children in post judgment divorce proceedings upheld; the trial judge "was authorized... to appoint a guardian ad litem and he was justified in awarding the fees given [to the guardian] because such fees both benefited the minor children of the parties and protected their interests." *Id.* at 493). The order of appointment did not indicate that this was a pro bono appointment, and, consequently, the parties were on notice that the award of such a fee was a possibility in this case in the discretion of the trial court. The fact that the guardian initially indicated to the parties that he would not seek such a fee did not, as urged, preclude the guardian from later changing his mind in view of the enormous amount of time and expense that he was required to expend in this case, and the extraordinary impact on the guardian's availability to his regular law practice. *Cooper v. Kahn*, 600 So.2d 35 (Fla. 3d DCA 1992); *Meloan v. Coverdale*, 525 So.2d 935 (Fla. 3d DCA), *rev. denied*, 536 So.2d 243 (Fla. 1988); *see Standard Guaranty Ins. Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990); *cf. White v. Board of County Comm'rs*, 537 So.2d 1376, 1380 (Fla. 1989) (court appointed attorney); *Marion County v. Johnson*, 586 So.2d 1163, 1167 (Fla. 5th DCA 1991) (attorney ad litem). *See generally* Senate Judiciary Civil Committee of Florida, Staff Analysis on S.B. 110 [§§ 61.401-404, Fla. Stat. (1993)], at 2 (February 22, 1990)("The court could tax the temporary and permanent fees of and costs incurred by the guardian

ad litem and his attorney against either or both parties. Costs and fees could not be taxed against the guardian ad litem or the guardian ad litem program."). Moreover, no showing has been made that the husband detrimentally relied on the guardian's earlier indication that he would not seek fees, or, that, indeed, he ever requested the guardian to perform any services in this case at all.

Affirmed.

HUBBART and GREEN, JJ., concur.

COPE, Judge (concurring in part and dissenting in part).

I concur with regard to the order changing custody of the children.

I respectfully dissent from the affirmance of the attorney's fee award to the guardian ad litem. The majority opinion states, "The order of appointment [of the guardian ad litem] did not indicate that this was a pro bono appointment, and, consequently, the parties were on notice that the award of such a fee was s possibility in this case in the discretion of the trial court." Majority opinion at 5. (Page 5 of this Appendix).

The suggestion that the parties were on notice that a fee might be charged is contrary to the undisputed evidence in the record. The guardian ad litem himself was very specific that he was appointed with the understanding that this was a pro bono matter. He stated that he "spoke with counsel who... anticipated that I would not receive a fee and I have to say that candidly on

the record." Counsel for the husband and counsel for the wife both were unequivocal about their understanding that the assignment was pro bono, and consequently that there was no entitlement to a fee award for the guardian ad litem. Both parties acknowledged that the guardian ad litem had done an outstanding job. By virtue of the original understanding, however, both stated that the guardian should be compensated for out-of-pocket costs, but not fees.

The guardian ad litem indicated that when he undertook the assignment, he anticipated that this would be a relatively short, well defined matter. As events worked out, the change-of-custody proceedings became protracted and consumed a significant amount of his time over a two-year interval from 1991 to 1993. Because of the magnitude of the time involved, the guardian ad litem felt that it was reasonable to request a fee award as well as out-of-pocket costs. The guardian ultimately submitted a claim for about half of the hours he and his associate had expended. The trial court entered a judgment in favor of the guardian ad litem for $24,300 in fee and $519 in costs.

Where a guardian ad litem undertakes an assignment with the understanding that it is pro bono, and the guardian ad litem later decides that his or her services should be compensated, it is incumbent on the guardian ad litem to give prompt notice of that fact to the court and the parties *before* further services are performed. By that means, the court and the parties can make an informed decision about how to proceed in the case *before* fee obligations are incurred. One option is simply to allow the guardian ad litem to submit a final report and

withdraw. Another possibility is to substitute another guardian ad litem who is willing to serve on a pro bono basis. Another option is to redefine the guardian ad litem's role to limit the time commitment to a more manageable level.

It is not fair to the parties to retroactively change what was to have been an unpaid assignment into a paid assignment. If the guardian ad litem is no longer able to proceed on a pro bono basis, then an appropriate motion should be filed requesting leave to withdraw or to convert the matter into a paid assignment. If the court elects to convert the assignment to a fee-paying one, the authorization for payment should extend to time subsequently expended, but not to hours previously incurred on a pro bono basis.

There is no doubt that the guardian ad litem in this case expended many hours in the interests of the minor children. Under the circumstances, however, the order awarding attorney's fees to the guardian ad litem should be reversed.

APPENDIX B

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

FAMILY DIVISION
Case No. 87-16362 (FC 07)

IN RE: THE MARRIAGE OF

CYNTHIA U. METCALFE,
n/k/a CYNTHIA U. KELLY,

Petitioner,

vs.

JOHN J. METCALFE, III,

Respondent.

FINAL JUDGMENT GRANTING PETITIONER'S MOTION FOR CHANGE OF CUSTODY

THIS MATTER, came before the Court for Trial on January 20, 1993, January 27, 1993, March 8, 1993 and August 11, 1993, on the Petitioner/Former Wife's ("CINDY") Amended Motion for Change of Custody. CINDY sought a change of custody based upon

substantial change in the circumstances of the children since the date the Court entered its Final Judgment of Dissolution of Marriage on January 27, 1988. CINDY also sought child support from the former Husband, JOHN J. METCALFE, III ("JOHN"). CINDY also requested that her attorneys' fees and costs be taxed against JOHN. JOHN responded by filing a Petition for Child Support. JOHN requested that his attorneys' fees and costs arising from his claim for child support be taxed against CINDY.

Both parties presented testimony and other such evidence as they deemed appropriate. The Court had the opportunity over four (4) days of Trial to observe the demeanor of the witnesses as called by the respective parties and gave such weight to their testimony as the Court in its discretion deemed appropriate. On all of the credible evidence presented, the Court finds:

FINDINGS OF FACT

1. The Court relied heavily upon the evaluations and testimony of Dr. Ruth Latterner who was the only mental health expert involved in this matter who personally interviewed and evaluated all of the parties involved. Although the Court accepts her findings as they relate to the minor children, it rejects her opinion that they should remain with JOHN because of their fragile condition.

2. The Court relied heavily upon the opinions of the Guardian Ad Litem, Richard C. Milstein, Esq. The Court finds that Mr. Milstein worked tirelessly in this matter and that after extensive investigation and

interviews and countless hours devoted to these efforts, Mr. Milstein arrived at the conclusion that the children should reside with the mother.

3. The Court finds that CINDY has experienced visitation problems throughout the period following the dissolution of the parties' marriage. The Court finds that the father has not complied with the spirit of shared parental responsibility laws and although he has not totally blocked visitation, he has been less than cooperative in effectuating visitation and less than generous in compromising or allowing any additional or alternate visitation outside that provided by Court Order.

4. The Court also finds that despite longstanding recommendations by mental health experts (including specifically Dr. Ruth Latterner, the court-appointed psychologist) and apparent agreement among all experts and the guardian ad litem that psychological treatment and therapy is required for the children and the parties, the Court has been apprised of no effort by the current custodial parent (JOHN) during the pendency of this litigation and over the past several months to initiate such treatment and therapy.

5. The Court finds based upon all of the testimony, the foregoing findings, the reports, recommendation and testimony of Barbara Pope, (the Palm Beach County Home Study Evaluator) and testimony of Robert Kelly, (Cindy's current husband and the children's stepfather), Laurence and Kathryn Upham, (Cindy's parents and grandparents to the children), the Report and Recommendations of Guardian Ad Litem, Richard C. Milstein, and the various exhibits introduced

and admitted into evidence at Trial, that CINDY has demonstrated a substantial and material change in circumstances both in herself and in the children since the date of the dissolution of the parties marriage and Final Judgment incorporating same.

6. The Court specifically finds that based upon the pleadings and the entire record before the Court, CINDY has adequately presented a material and substantial change in circumstances sufficient to support the rulings made herein.

7. Additionally, based upon the testimony and evidence admitted at Trial, the Court specifically finds that it is the best interest of the minor children, Bobby and David Metcalfe that the change in custody to CINDY occur, and that the children's best interest will be promoted by the change of custody to CINDY.

8. The Court further finds that based upon consideration of the record before the Court, and the greater weight of the evidence admitted at Trial that, the factors contained in Section 61.13(3) Fla. Stat. both support a change of custody to CINDY and that the best interests of the minor children are promoted by the change.

9. The Court finds that it has jurisdiction of the parties and the subject matter of this action.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Court makes the following conclusions of law:

a. That a movant is required to show both a substantial and material change in circumstances and that the best interests of the children will be promoted by change of custody. *McIntyre v. McIntyre*, 452 So.2d 14 (Fla. 1st DCA 1984).

b. That both the pleadings and the record demonstrate that CINDY has adequately presented a material and substantial change in the conditions affecting the custody of the children and that the best interests of the children will be promoted by the change. *See McIntyre.*

c. That the paramount and prime consideration of the Court in custody determination is the best interest of the children. *Dinkle v. Dinkle*, 322 So.2d 22 (Fla. 1975). *See generally, Sherman v. Sherman*, 558 So.2d 149 (Fla. 3d DCA 1990). Where the record demonstrates that severe emotional problems in the children have occurred since the time of the entry of the Final Judgment, change of custody is permissible and within the Court's authority. *Wilson v. Wilson*, 504 So.2d 1278 (Fla. 1st DCA 1986).

d. That it is not necessary that for the Court to change custody of minor children, the Court find that the prior custodian is unfit. *Jayne v. Dennison*, 284 So.2d 237 (Fla.2nd [DCA][sic]1973).

e. That it would be improper to change custody of the minor children where there are allegations that the children have emotional problems, absent a clear showing that the custodial parent in any way caused the children's emotional problems, (*see Shelley v. Shelley*,

480 So.2d 166 (Fla. 1st DCA 1985). The record sufficiently and credibly demonstrates and supports such a finding.

Accordingly, it is therefore,

ORDERED AND ADJUDGED:

1. That CINDY's Amended Motion for Change of Custody of the Final Judgment of Dissolution of Marriage originally entered on January 27, 1988, be and the same is hereby GRANTED.

2. That the minor children Bobby and David Metcalfe shall begin living with CINDY, as the primary residential parent, on the weekend immediately after entry of this Order.

3. The Court orders that the parents effectuate the change as smoothly and with as little trauma to the children as possible and will cooperate with each other in carrying out both the spirit and language of this Order.

4. That the parties and the minor children shall forthwith commence the therapy recommended by Ruth Latterner with a psychologist practicing in Broward County to be agreed to by counsel for the parties or in the event agreement is not possible to be named by the Court.

5. That JOHN shall have visitation with the minor children, without supervision, and in the same frequency as currently in place for CINDY. However, the parties shall alternate responsibility for transportation of

the minor children to and from visitation.

6. The Court reserves jurisdiction on the issue of child support. By this Order, the matter is hereby referred to the General Master's office for determination.

7. The Court hereby reserves jurisdiction on the issue of any claims for entitlement to attorneys' fees and costs and the amount of same if any. This matter shall not be referred to the General Master, and shall be heard by the Court upon notice to all parties.

8. The Court retains jurisdiction of this matter, the parties, and to enforce the provisions of the Judgment, and if necessary to enter specific visitation schedules.

9. The Court hereby discharges Guardian Ad Litem, Richard C. Milstein, Esq. and reserves jurisdiction to award attorneys' fees and costs, if any to Mr. Milstein.

ORDERED in Chambers, Miami, Dade County, Florida this 30th day of September, 1993.

/s/Bernard S. Shapiro
Bernard S. Shapiro
Circuit Court Judge

Copies furnished to:

Glenn J. Holzberg, Esquire
David Donet, Esquire
Richard C. Milstein, Esquire

APPENDIX C

Case No. 93-02411
Case No. 94-70
(Consolidated)
Florida Bar No. 283975

IN THE
DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JOHN J. METCALFE,
Appellant,

vs.

CYNTHIA U. METCALFE,
Appellee.

INITIAL BRIEF OF APPELLANT

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Coral Gables, Florida 33145

and

Law Offices of
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Suite 2100 - Courthouse Tower
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(305) 577-0090
Attorneys for Appellant

The excerpts from the Initial Brief filed by the Petitioner herein with the Court of Appeal of Florida, Third District, follow, starting at page 16 thereof:

Q: And when you say "to save yourself and your son," what do you mean by saving yourself and your son?

Cindy Lee: I wanted to prove John unfit so that perhaps Dade County would see that Jordan would be better off with me and I would not be put in prison for parental kidnapping.

Q: What led you to conclude, you know, to have this strong belief that Jordan was going to be taken away from you and that you were going to prison?

* * *

Cindy Lee: I was in a terrible state of mind. I was frightened and I was repeatedly told over and over again to get

yourself out of the country or get yourself and attorney because your child is going to be put up for adoption and if you take him away and stay in the Country, you will be arrested for parental kidnapping.

Q: And who told you that?

Cindy Lee: Bob and Cindy Kelly."
(Deposition of "Cindy Lee," pg. 20-21; 23; 27; 39-40). [9]

Despite the foregoing testimony and despite the fact that "Cindy Lee" recanted every negative statement made by her in her "sworn statement," the Wife and her new husband, Robert Kelly, were permitted to testify about the contents of the "sworn statement" and to relate, as "facts," (although neither had any personal knowledge of the claimed events) the claims concerning the Husband made by "Cindy Lee" in the disavowed "sworn statement." (See, e.g., TR. 1/27/93, 246, 248, 251; TR. 3/8/93, 136-138). [10]

D. The Veil of Secrecy Placed Around the

---

[9] The "sworn statement" and the deposition of "Cindy Lee" were admitted in evidence below. (TR. 8/11/93, 33; Wife's Exhibit 6).

[10] The Husband's objections to such testimony were regularly overruled without explanation. (See, e.g., TR. 1/27/93, 253, 256; 3/8/93, 68, 71, 78).

Guardian ad Litem

Early in the proceedings, the trial court appointed Richard Milstein to serve as "Guardian ad Litem" in the proceedings below. Mr. Milstein thereafter attended all of the hearings and depositions, filed pleadings, attended the final hearing and submitted a "Report of Guardian ad Litem" containing his recommendations as to the issue of modification of custody. The trial court, however, determined - in the initial stages of these proceedings - that the Guardian ad Litem was "protected" by statutory "confidentiality" and could not, therefore, be deposed nor made to state in any way the basis for his opinion, the nature of his investigations, or the data and information obtained by him upon which his recommendations were based. The Husband was thus prevented from conducting any type of discovery of the Guardian ad Litem although he repeatedly tried.

To begin, in July, 1992, the Husband served a "Request for Production" upon the Guardian ad Litem seeking production of the following:

1. "Any reports received by the Guardian ad Litem from any investigator, doctor, or any other person, in connection with these proceedings."

2. "Any recordings of any conversations or otherwise, and transcripts thereof it they have been transcribed, regardless of when made, to which the Petitioner or Respondent is a party, or which have a bearing on these proceedings."

3. "Any statements of any persons, including

written, oral, stenographic, mechanical, or other recording, or a transcript thereof, whether given under oath or otherwise, received or obtained by the Guardian ad Litem or any other person, whether at the Guardian ad Litem's direction or otherwise, in connection with these proceedings."

4. "The results of any electronic or other surveillance of the Respondent or the minor children of the parties, including, but not limited to films, photographs, videotapes, or otherwise, and any documents related thereto."

5. "Reports or statements of experts made in connection with this case, including results of physical or mental examinations, scientific tests, experiments or comparisons, of either the parties hereto, or the minor children of the parties."

6. "Reports or statements of day care workers, teachers, doctors, clergy, or experts made in connection with this case, including any discussion held regarding either of the parties hereto, or the minor children of the parties."

7. "Any tangible papers, objections, or other items, which the Guardian ad Litem intends to introduce at Hearing, or otherwise, and which were not covered by the preceding requests to produce." (App. 11).

The Guardian ad Litem immediately filed an "Objection" to the Request for Production, objecting to every single item requested on the following basis:

Guardian ad Litem objects to Respondent's Request for Production of Documents, paragraphs 1 through 7, as overly broad and requiring the production of documents protected under the attorney-client privilege and work product privilege. As attorney for the minor children, Robert and David Metcalfe, Guardian ad Litem will not produce documents protected and further states that this is an attempted breach of confidentiality which would cause the parties and third persons, not to respond candidly to the Guardian ad Litem, knowing that the response may become a part of the production for others. (App.14).

The Husband then filed a "Motion to Compel Guardian ad Litem to Respond to Request for Production of Documents" and the Guardian's "objections" were sustained and the Husband's motion to compel denied. (App. 8; 16).

Meanwhile, the Guardian prepared and filed a "Report" (recommending that the custody of the children be changed from the Husband to the Wife) and the Husband could discover nothing whatsoever about the basis for the Guardian's recommendation (because of the trial court's belief in the "confidentiality" of a Guardian ad Litem), a problem which arose repeatedly during the proceedings below. For example, the issue arose at the beginning of the case below:

Husband's counsel: Your Honor, if I may before we go on with an opening statement,

take a couple of procedural matters. I think it is important for me to again reiterate our objection to our inability to conduct any discovery of the guardian ad litem. Because of that inability we feel that we cannot adequately prepare the defense of this petition for child custody. The Court heard that motion a while back where the -

The Court: Okay. I already ruled on that.

Husband's counsel: I understand, Your Honor, but now that the ultimate result has occurred, which is that the guardian ad litem has filed with the Court a report and recommendation, and for the record we simply want to object to that report and recommendation on the basis that we haven't had an opportunity to depose the guardian ad litem to do any discovery, to receive any discovery from the guardian ad litem, and that we believe that the report on its face seems to indicate that that is at least partly based on hearsay information. So, on, on that basis, we would object to the Court receiving the report of the guardian ad litem.

Wife's counsel: Your Honor, my response would be that not only was this matter covered, but Section 61.401, I believe it's 01, and then 03 or 4 is the operative section, is very clear. The guardian ad litem has very

broad powers to assist the Court in matters of child custody. ***All of its investigations, its findings, the data, the notes, what have you, are confidential by statute. I believe that that ruling has been made by Your Honor for that exact reason...***

The Court: You don't have to argue this. It's over. (TR. 1/20/93, 6-8, emphasis supplied).

Then, when the Wife desired to call the Guardian ad Litem as a witness in her case (his Report being favorable to her position), the trial court - again relying on the purported statutory "confidentiality" of a guardian ad litem, determined that it would be pointless to have the guardian testify because he could not be asked to explain or defend his Report nor about the sources of his information nor about "things that are missing from [his] report:"

Wife's counsel: Your Honor, it is our position that since Your Honor has ruled previously that [the guardian] would not be an advocate at the end of the case, an attorney asking questions, et. cetera, during the course of the case, that we would ask that he be allowed to testify. I believe that his impressions, his findings, the work that he put in to reach his conclusions are necessary to make a full determination as to the best interest of the children...

Husband's counsel: Your Honor, we would

have to argue against it... it is our position that early in the case we attempted to obtain discovery from the guardian ad litem so that we could find out what was the basis upon which the guardian would ultimately render his report. As the Court may recall-

The Court: I denied that.

Husband's counsel: [I] think under those circumstances, were the guardian now to testify, would put us at a disadvantage since our position has been all along that a lot of the guardian's report is based upon hearsay and other information that may be damaging in that sense and that we would not be able to rebut or contradict in any way or impeach in any way.

The Court: Well, it's still confidential which was my ruling at the time. His ... the sources of the information.

Wife's counsel: I think [the guardian] is critical to the Court's determination of what's best for these kids.

Husband's counsel: By the same token [the guardian ad litem's testimony] would delve into matters [about] which we have not been able to obtain any discovery or be prepared to argue against.

The Court: Mr. Milstein [the guardian], do you have any input here?

The Guardian: The concern we have has already been raised about confidentiality...My concern would be that any testimony, should the Court rule that I have testimony, would breach the confidentiality aspect of the statute, and how you utilize that information that's being funnelled then, and then come out of a report...My concern is divulging where that information has come from directly because I think that would breach the - breach that relationship that the ad litem must have will all the parties to be able to speak freely with him or her. In this instance I have spoken to all of the parties, all of the principals, all the experts...if I were to particularize as to statements of any one of those people, I think I would lose that confidentiality and I don't feel I can testify in that way.

* * *

The Court: Let me reserve ruling on that and look at the report again. My concern is that all it would end up being is him reading me his report *because you are not going to be able to ask him things that are missing from a report,* so I don't know if it would serve any purpose, but I'll take a look. (TR. 3/8/93, 3-9).

Once again, the Husband objected to the veil of secrecy being placed around the Guardian ad Litem while the Guardian's "recommendations" were being considered and reviewed by the trial court:

> **Husband's counsel: Your Honor, just to be absolutely clear on our position, we maintain the position that the guardian ad litem, the statute could not prohibit the guardian ad litem from testifying and we maintain the position that the confidentiality aspect of the statute refers to divulging that information to third parties, but definitely not to the parties. I take issue or I would say argue against the position of [the guardian] with regard to the guardian being someone who is supposed to be able to talk to everyone freely and be completely isolated from the proceedings...Why we are arguing against his testifying at this time is that because we were not given an opportunity to depose him and obtain the source of - or the sources of information from which he prepared his report, we're not able to adequately prepare to rebut any of the - any part of the report and we obviously disagree with the conclusion that he reached in his report.** (TR. 3/8/93. 10).

The Husband's continued objections to the trial court's procedure and position with respect to the Guardian's "confidentiality" were overruled, the Guardian's Report was presented to the trial court

(recommending that "the primary custodial parent should be changed to [the Wife]") and the trial court ultimately made its determination in this case upon the express "heavy reliance" upon the "opinions of the guardian ad litem" who, according to the trial judge, "after extensive investigations/interviews and after countless hours devoted to same has arrived at the conclusion that the children should reside with the mother." (App. 18).

The Husband's "Motion for Rehearing," eloquently stated the problem created by the trial court's interpretation of Section 61.401, Florida Statutes:

> **[The Husband] would urge this Honorable Court to consider that, in denying [the Husband's] Motion to Compel [discovery of the Guardian], [the Husband's] rights to due process and the equal protection of the laws under the Florida and United States Constitutions were violated, given that the Guardian ad Litem was able to render a Report and Recommendation to the Court, without affording [the Husband] an opportunity to prepare any defense to such Report and Recommendation, or even to find out the specific premises upon which the conclusions reached by the Guardian ad Litem were based.**
>
> **The significance of the Guardian ad Litem's Report is clear. This Honorable Court obviously considered it of paramount importance in granting [the Wife's] motion to change custody. Indeed, the Court**

indicated, in the Final Judgment which gave rise to this Motion, that the Court relied heavily upon the opinions and recommendations of the Guardian ad Litem, who had worked countless hours and had conducted an extensive investigation in this matter.

By contrast, such questions as: Doing what types of things did the Guardian ad Litem devote countless hours? Who and what were the sources of information relied upon by the Guardian ad Litem in formulating his opinion? What was the quality of that information? What was the reliability of any statements and other information obtained by the Guardian ad Litem? What significant and material sources or factors [did] the Guardian ad Litem fail to consider, or simply ignore? and, How impartial was the Guardian ad Litem's Report and Recommendations to the Court?, are all relevant, material and important questions, the answers to which [the Husband] has a right to receive under the due process and equal protection clauses of the Florida and United States Constitutions... (R. 158-162).

Not surprisingly, given the trial judge's interpretation of the guardian ad litem statute, the Husband's "Motion for Rehearing" was denied.

E. The Trial Court's Written Ruling.

Six weeks after the final day of hearing, the trial judge prepared and forwarded to counsel (by "fax") a single page, ten paragraph written memorandum of his ruling in the case, beginning as follows:

> **Former Wife's Petition for Modification as it pertains to custody (primary physical residence) of the parties' minor children is granted. The following conclusions are to be included in any proposed Final Judgment along with other matters/ arguments set forth in Memorandum.** (App. 18).

The trial judge's written ruling contained absolutely no finding whatsoever regarding any substantial or material changes in circumstances (the words appear no where in the written ruling) and made no finding regarding the best interest of the children. Instead, the trial judge listed his rationale for ordering a modification only as follows:

> **The Court has relied heavily upon the evaluations/testimony of Dr. Ruth Latterner, the only mental health expert involved in this matter who has ...**

* * *

CONCLUSION AND CERTIFICATE OF SERVICE

Based upon the foregoing, the Husband respectfully submits that the trail court erred as a matter

of law, abused its discretion and violated the Husband's constitutionally protected right of due process in the entry of the Final Judgment herein modifying the custody of the parties' minor children and, therefore, the Final Judgment must be reversed as must the trial court's order awarding attorney's fees to the Guardian ad Litem.

APPENDIX D

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

FAMILY DIVISION

CASE NO. 87-16362 (FC 07)

IN RE: THE MARRIAGE OF

CYNTHIA U. METCALFE,

Petitioner,

and

JOHN J. METCALFE, III,

Respondent.

MOTION FOR REHEARING

Fla. Bar No. 307181

The Respondent, JOHN J. METCALFE, III, by and through his undersigned attorney, files this, his Motion For Rehearing, and in support thereof, states as follows:

The Respondent would respectfully request that the Court reconsider its Final Judgment Granting Petitioner's Motion for Change of Custody, entered on September 30, 1993. Respondent would respectfully contend that this Honorable Court was apparently swayed by the Guardian Ad Litem's argument, both, in his Objection to Respondent's Request for Production and at the Hearing held on September 10, 1992, on Respondent's Motion to Compel Guardian Ad Litem to Respond, etc., that the discovery request served on the Guardian Ad Litem by the Respondent was an attempted breach of the confidential nature of the information obtained by the Guardian Ad Litem in the performance of his duties in this case.

Respondent would urge this Honorable Court to consider that, in denying Respondent's Motion to Compel, Respondent's rights to due process and the equal protection of the laws under the Florida and United States Constitutions were violated, given that the Guardian Ad Litem was able to render a Report and Recommendation to the Court, without affording Respondent an opportunity to prepare any defense to such Report and Recommendation, or even to find out the specific premises upon which the conclusions reached by the Guardian Ad Litem were based.

The significance of the Guardian Ad Litem's Report is clear. This Honorable Court obviously considered it of paramount importance in granting Petitioner's motion to change custody. Indeed, the Court indicated, in the Final Judgment which gave rise to this Motion, that the Court relied heavily upon the opinions and recommendations of the Guardian Ad Litem, who

had worked countless hours and had conducted an extensive investigation in this matter.

By contrast, such questions as: Doing what types of things did the Guardian Ad Litem devote countless hours? Who and what were the sources of information relied upon by the Guardian Ad Litem in formulating his opinion? What was the quality of that information? What was the reliability of any statements and other information obtained by the Guardian Ad Litem? What significant and material sources or factors the Guardian Ad Litem failed to consider, or simply ignored? and, How impartial was the Guardian Ad Litem's Report and Recommendations to the Court?, are all relevant, material and important questions, the answers to which Respondent has a right to receive under the due process and equal protection clauses of the Florida and United States Constitutions, to be able to defend himself against the malicious and self-serving charges made against him by the Petitioner in this case. In fact, the answers to some or all of these questions, we would argue, would have convinced the Court to decline to change the children's primary residence in this case.

So damaging was the Guardian Ad Litem's Report. So compelling his Recommendation, that this Honorable Court was obviously convinced by it to ignore, not only the Report of the Court's own psychologist, but also that psychologist's unbendable expert opinion at trial that the Metcalfe children should not be moved from their father's home because of the irreparable psychological and emotional damage that such a move would cause the children. A professional opinion that was shared by Dr. Nancy L. Greenfield, the well known and esteemed

child psychiatrist who not only reviewed the entire file of the Court-appointed psychologist, Dr. Ruth M. Latterner, but who also followed the children's progress at school over the almost two years that these proceedings were pending, and who testified at trial that it was obvious to her that the children's emotional well being and overall mental health would be irreparably damaged by a change of residence.

Respondent would respectfully urge this Honorable Court that, at the Hearing held on September 10, 1992, on Respondent's Motion to Compel, the Guardian Ad Litem's argument that he would never be able to obtain candid information from anyone unless he could assure the confidentiality of the source, clouded the real issue then and now before the Court, which is the paramount Constitutional right of every person to confront his accusers and to prepare his defense. In denying the Respondent those Constitutional protections, this Honorable Court has respectfully erred, especially in light of the importance that the Guardian Ad Litem's Recommendations had in the Court's formulation of a decision in this matter.

WHEREFORE, the Respondent, JOHN J. METCALFE, III, prays that this Honorable Court will vacate its Final Judgment Granting Petitioner's Motion for Change of Custody, and enter its Order granting Respondent's Motion for Rehearing, requiring the Guardian Ad Litem to provide discovery in this matter, and granting a new trial, for the reasons aforesaid, and for such further relief as the Court deems just and proper.

I HEREBY CERTIFY that true and correct

copies of the foregoing Motion For Rehearing were served via telecopier and by United States Mail on GLENN J. HOLZBERG, ESQ. Attorney for Petitioner, Suite 2701, 150 West Flagler Street, Miami, Florida 33130 and on RICHARD C. MILSTEIN, ESQ., Guardian Ad Litem, 24th Floor, 801 Brickell Avenue, Miami, Florida 33131, on this 12th day of October, 1993.

/s/ David A. Donet
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APPENDIX E

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

DIVISION FC 07
CASE NO.: 87-16362

CYNTHIA U. METCALFE,

Plaintiff(s)/Petitioner

vs.

JOHN J. METCALFE, III,

Defendant(s)/Respondent.

ORDER DENYING DEFENDANT'S [MOTION FOR REHEARING] [sic]

THIS CAUSE having come on to be heard on Respondent's Motion for Rehearing dated October 12, 1993, and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby denied.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida this 13th day of October, 1993.

/s/Bernard S. Shapiro
Circuit Judge

Copies furnished to:
David A. Donet, Esq.
Glenn J. Holzberg, Esq.

Supreme Court, U.S.
FILED
APR 17 1996
CLERK

No. 95-1490

In The

Supreme Court of the United States

October Term, 1995

JOHN J. METCALFE, III,

Petitioner,

vs.

CYNTHIA U. KELLY f/k/a CYNTHIA U. METCALFE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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ON ISSUE RAISED

Mr. Metcalfe was not denied due process in that the Guardian Ad Litem specifically advised as to his sources, including everyone he had spoken to and interviewed. Mr. Metcalfe had the opportunity to depose and seek production from same. He didn't.

STATEMENT OF THE CASE

Mrs. Kelly, the mother of twin boys, filed a Petition for Change of Custody in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, Family Division. The trial court entered its Final Judgment granting Mrs. Kelly's Motion for Change of Custody (Appendix B to the Petitioner's Petition for Certiorari). That decision shows, on its face, that the trial court, based upon all of the testimony of, *inter alia*, the Guardian Ad Litem, the experts, the Home Study Evaluators, parties and family members that there was a substantial and material change in circumstances such that it would greatly promote the children's best interest to live with Mrs. Kelly.

There is little in the Petition herein which reflects the record made at the trial court level. It is, however, unnecessary to turn to that record or to rebut the rhetoric upon which the assertions of error are predicated. It is sufficient to note that this was, indeed, an action for change of custody of the children based upon substantial and material change in circumstances.

The trial court heard that the mother became stable and created a nurturing and loving home environment for the children. On the other hand, not only did Mr. Metcalfe remarry, get divorced, have another child and was unemployed, but more importantly, Mr. Metcalfe was dysfunctional and his behavior bizarre.

Mr. Metcalfe appealed to the Florida Third District Court of Appeal who, not only confirmed *pre curium* (Appendix A to the Petitioner's Petition for Certiorari), but also directly addressed Mr. Metcalfe's due process argument. The appellate court stated that due process had not been violated especially since the Guardian Ad Litem disclosed from, day one, whom he had interviewed.

The Supreme Court of Florida declined to accept jurisdiction.

REASONS FOR DENYING THE WRIT

The gravamen of the Petitioner's position in this cause is his claim of denial of due process and of a fair trial. His sole basis is that he was not allowed to depose the Guardian Ad Litem. That is the law in Florida. It is clear from the Guardian Ad Litem's report that his sources were clearly identifiable. Metcalfe could have obtained the information directly from the sources' mouths rather than second hand from the Guardian Ad Litem. The fact of the matter is that Metcalfe knew that deposing the sources would not benefit his case and, thus he chose to defend by attacking the messenger rather than the message.

The District Court of Appeal of Florida, Third District confirmed the decision of the trial court because it found that the material factual findings upon which the Final Judgment was based were clearly correct as tested by the standards. Further, the District Court's construction of the Florida law is consistent and reasonable. This Petition, therefore, presents to this Court no conflict of decisions, state or federal, and no actual departure from the accepted or usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Neither does that decision raise an important question of

federal, or indeed, state law which has not been, but should be, settled by this Court. Metcalfe is only dissatisfied with the fact that he no longer has his children to abuse. His rhetoric to the contrary, notwithstanding, the judgment of the Florida Appellate Court protects only the parties to that judgment and makes no change in the manner in which the Florida law has been construed since its enactment.

ARGUMENT

The cases cited in Metcalfe's Petition do not address the point. In the main, the cases referred to the right to cross examine an examiner, case worker, home study worker, etc. Metcalfe had that right. He also had the Guardian Ad Litem's report and did, indeed, cross examine the Guardian Ad Litem at trial.

The Petitioner cites *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972), a due process case that has nothing factually relative with this cause. As the Petitioner stated in his Petition, *Stanley* talks about a father being entitled to a hearing concerning his fitness as a parent. Metcalfe had that.

All of the other cases cited by the Petitioner are also not on point. *Bass v. Bass*, 437 P.2d 324 (Alaska 1968), ruled that considering the report of the child welfare worker in a custody case is not error. *Fewel v. Fewel*, 144 P.2d 592 (Cal. 1943), held that an investigator is subject to cross examination. *Anderson v. Anderson*, 445 P.2d 397 (Colo. 1968) (en banc), held that the statute permitting use of a probation department report was correct. *Yearsley v. Yearsley*, 496 P.2d 666 (Idaho 1972), said a report must be made in open court with the right of cross examination. *Fisher v. Devins*, 200 N.W. 2d 28 (1972), stated that a party was entitled to cross examine the probation officer who wrote a report. *In re: The Marriage of Kramer*, 580 P.2d 439 (Mont. 1978), found it was error to exclude a report of a county

welfare department and to limit the testimony of the investigator. *Roberts v. Roberts*, 226 S.W. 2d 579 (Ark. 1950), would not let in a report unless the preparer testified. *Malone v. Malone*, 591 P.2d 296 (Okla. 1979), states that an investigator must submit to cross examination. *Thorlaksen v. Thorlaksen*, 453 N.W. 2d 770 (N.D. 1990), permitted the use of a home study report so long as the husband could cross examine the preparer. *Schmitz v. Schmitz*, 351 N.W. 2d 143 (S.D. 1984), stated it was proper to admit a home study report even containing hearsay. *Larson v. Larson*, 140 N.W. 2d 230 (Wis. 1966), held that use of reports by welfare personnel was within the sound discretion of the court. Nothing in any of these cases conflict with the decision of the trial court herein.

There was enough before the trial court about Metcalfe that even excluding the Guardian Ad Litem's report and testimony, the trial court had more than enough testimony and information before it to decide in favor of Mrs. Kelly. In fact, the facts were overwhelming. Truth be told, every witness save for Petitioner's hired gun, testified against him. The court appointed expert was so fearful as to how her dysfunctional findings would upset Mr. Metcalfe, that she did not want to put them on record. The trial court heard from everyone and made its decision.

Mr. Metcalfe is incorrect in his assertion that Florida case law supports his position. To begin with, the Guardian Ad Litem is one who is appointed as an officer of the court, not as a party to the action. The Guardian Ad Litem is much like a minor bring suit by his "next friend". The "next friend" is an officer of the court making but a special appearance to look after the interest of the ward. *Youngblood v. Taylor*, 89 So. 2d 503 (Fla. 1956).

Since the Guardian Ad Litem wasn't a party nor a witness, information and documentation which he gathers, is his work-product. If one looks at the cases cited by the Petitioner, both

before the Florida Appellate Court and before the Court herein, one finds that they concern themselves with the HRS workers, home study and social investigation, testimony and reports, not a Guardian Ad Litem who effectively stands in the shoes of the children and acts for the court.

The Florida courts have long held that it is error to prohibit the right of cross examination of a case worker as to the case worker's skills in preparing a report.

Mr. Metcalfe could have, but chose not to, depose, *inter alia,* the home study people. It is a given that the court can't conduct its own investigations and appoints a Guardian Ad Litem to assist in so doing. Had the court done the investigations itself, could the court be subject to production requests and being deposed? I think not.

Unbelievably, the Petitioner cites *Kern v. Kern,* 333 So. 2d 17 (Fla. 1976). In *Kern,* the Florida Supreme Court held that notwithstanding technical rules, that it is constitutional for a court to consider reports containing hearsay and other inadmissible opinion statements, and that admitting the report, was not a violation of law. *Kern* also stands for the long held position that:

> . . . the credibility of witnesses and the weight of their testimony is best determined by the trial court, fact findings made by trial judges in custody hearings should be accorded great weight.

and

> It has been held that, so long as such reports or description of contents thereof were made

> available to the parties, there is no violation of due process guarantees. . . . In the instant case, nothing prevented Mrs. Kern from calling as witnesses, the case workers who prepared the reports, as well as the persons whom they interviewed.

It was true in *Kern* that nothing prevented the wife from calling a case worker as a witness. Nothing prevented Mr. Metcalfe from doing likewise, or deposing same.

The Petitioner fails to cite *Leinebach v. Leinebach*, 634 So. 2d 252 (Fla. 2d DCA 1994), wherein the Guardian Ad Litem submitted a report recommending a change of custody. The trial court errored in entering an order without a hearing relying solely on the report. The appellate court made it clear that there was a difference between the social investigative report and one of a Guardian Ad Litem. The appellate court stated that the statute was clear that the parties should have an opportunity to read the contents of the report prior to the entry of any Final Judgment or Order. The respondent heartedly agrees. In the case at bar, the Guardian Ad Litem's report, was dated January 14, 1993, and the last day of trial was on August 11, 1993. The Final Judgment was entered on September 30, 1993.

The trial court did nothing more than make its finding of facts and properly acted upon same. The appellate court did nothing more than exercise its appropriate appellant function in determining that the Final Judgment below was properly entered. Mrs. Kelly is content to rely upon trial and appellant court's opinions as her best advocate in opposing the Petition herein.

Mr. Metcalfe was not denied due process. His sole basis for even making the claim, is based on the Florida court's denial of

his appeal to overturn an order changing custody. He lost on the merits. Nothing can change that fact.

Mr. Metcalfe was afforded every opportunity to make discovery. The Guardian Ad Litem specifically advised as to whom he contacted and interviewed prior to arriving at his opinion. The Guardian Ad Litem specifically stated in his report, Appendix A, pp. 1a-7a, *infra*, that he had interviewed and spoken with the following:

(1) The Parties.

(2) Mrs. Cynthia *Lee* Metcalfe (his subsequent wife).

(3) The children's pediatrician.

(4) The children's day-care personnel.

(5) The children's elementary school personnel.

(6) The maternal grandparents.

(7) The Home Study investigator assigned to the Kelly home.

(8) The Home Study investigator assigned to the Metcalfe home.

(9) The Court appointed psychologist.

(10) The counsel for the parties.

(11) The children themselves.

The Guardian Ad Litem further attended the depositions of the parties and expert witnesses. He also reviewed the children's various medical and school records.

Mr. Metcalfe was free to depose and seek production of all of the above. He chose not to. The only depositions taken by Mr. Metcalfe were of Mrs. Kelly and the expert witness. Mr. Metcalfe *did not even attempt* to depose nor get production from anyone else save for the Guardian Ad Litem.

The trial court's decision was not arbitrary. The record is clear that the court appointed psychologist found Mr. Metcalfe to be a dysfunctional person in need of help. The mother's expert witness opined as to the children's emotional problems resulting from turmoil in their father's home. Cindy *Lee* Metcalfe, the father's subsequent wife, told of Metcalfe pulling his son out of the car and driving away, repeated corporal punishment and of locking the children in their bedroom when there was a fire in the kitchen. Additionally, custody and the evaluations adoption specialist, Barbara Pope, advised of the children's problems, their being programmed and about parental alienation by Mr. Metcalfe. (*See* Appendix B,pp. 8a-15 a, *infra*, for excerpts of Mrs. Kelly's brief below quoting from testimony given).

CONCLUSION

It is respectfully submitted that the Final Judgment changing custody to Mrs. Kelly be upheld. Mr. Metcalfe had sufficient notice, time and opportunity to take discovery and to present his case. The record clearly shows a sufficient basis for a change of custody. Nothing can change the fact that the best interest of the children have been promoted by the change in custody to Mrs. Kelly, with whom they have now lived for the past two and a half years.

This Honorable Court should deny review.

Respectfully submitted,

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APPENDIX A — REPORT AND RECOMMENDATION OF GUARDIAN AD LITEM

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

FAMILY DIVISION

CASE NO.: 87-16362 (FC 07)

IN RE: THE MARRIAGE OF:

CYNTHIA U. METCALFE,

Petitioner,

and

JOHN J. METCALFE, III,

Respondent.

REPORT AND RECOMMENDATION OF GUARDIAN AD LITEM

Guardian ad Litem, Richard C. Milstein, having been appointed by this Court in order to represent the interests of the minor children, Robert Metcalfe and David Metcalfe (collectively "the children"), hereby accepts his appointment as Guardian ad Litem and makes the following report and recommendation to the Court:

1. The undersigned was appointed as the Guardian ad Litem in this cause on October 18, 2991, as a result of the

apparent and real acrimony between the parties which have resulted in prolonged civil litigation. There is now pending a custody and child support petition before the Family Division of the Civil Court in the 11th Judicial Circuit in and for Dade County, Florida.

2. The parties involved in this action are as follows:

(a) John Metcalfe, who resides in a home titled in his mother's name in South Miami, Florida, John Metcalfe is self-employed as a tire broker and earns an annual income of approximately $23,000. He acknowledges financial assistance by his mother for the children and some of his needs.

(b) Cynthia ("Cindy") U. Kelly, resides with her husband, Robert ("Bob") Kelly, in West Palm Beach, Florida. Cindy Kelly is currently employed with Florida Power & Light and has an annual salary of approximately $27,300.

(c) Robert John Metcalfe and David Christopher Metcalfe are twin sons of the parties and were born in Miami, Florida, on October 2, 1986. They currently reside with their father and spend alternate weekends, alternate holidays and one month during the summer with their mother (only the last two summers). They are currently enrolled in Fairchild Elementary School, a Dade County Public School in the kindergarten program.

(d) Virginia Metcalfe, John Metcalfe's mother and the children's paternal grandmother, resides with John Metcalfe and the children. She is the technical custodian of the children since the Court Orders of October and November, 1991 require the children to reside with her. Virginia Metcalfe provides financial

assistance to her son, John Metcalfe, and the children since she makes direct third party payments for the children and pays other expenses for the household.

(e) Robert ("Bob") Kelly, Cindy Kelly's husband, lives with Cindy Kelly and is the children's stepfather. Robert Kelly is currently employed with Florida Power & Light and has been for many years.

(f) Cynthia Lee Metcalfe, John Metcalfe's current wife and the children's stepmother and former nanny, resides with her parents and her infant son, Jordan Metcalfe (natural son of Cynthia Lee and John Metcalfe) in Canada. There have been allegations and, indeed, admissions that Cynthia Lee has suffered from bouts of substance abuse and depression. John Metcalfe has instituted a dissolution of marriage proceedings, which would have appeared to have precipitated the current action between John Metcalfe and Cindy Kelly.

3. The undersigned has interviewed all of the parties in this cause. These interviews were conducted in person except for a telephone conference with Cynthia Lee Metcalfe from Canada with an associate of the undersigned. The undersigned has viewed both homes where the children resided since the proceeding started, met with the children's pediatrician, as well as the children's day school and spoke with the personnel at the daycare center and then at David Fairchild Elementary School. The undersigned has also had telephone conversations with the maternal grandparents, the home study investigator assigned to the Kelly's home, the home study investigator assigned to the Metcalfe home, and the court-appointed psychologist who evaluated the children. Also, the undersigned has conversed at length about the case with both the Kelly's former and current

counsel as well as with John Metcalfe's counsel. The undersigned has reviewed the medical records, school records and various correspondence sent to this office offered by various sources as to the children's condition. The undersigned has also attended the depositions of all of the interested parties and expert witnesses.

4. The undersigned visited with them on several occasions, at their daycare and at the undersigned's offices. Both children appear to be quite outgoing, but have a great deal of underlying issues and problems. The undersigned is somewhat troubled by the children's seemingly programmed answers about their preference among their parents. Both offered, rather mechanically, that they wished to live with their father, and that they preferred their father to their mother.

5. The undersigned has been requested to make a recommendation as to the primary custodial arrangements for these children and as to visitation between the non-custodial parent.

6. After reviewing the Florida Statutes that set forth the guidelines for shared parental responsibility and doing all of the foregoing, discussing the matter with various professionals about these children and their parents, the undersigned makes the following recommendation to the Court:

(a) The two children should remain and be brought up together as siblings since the bond between twins is very powerful and there is no reason for them to beseparated.

(b) Both parents appear to have significant distrust toward each other. The father seems to havemanipulated the

situation to a point where the best interests of the children are blurred by his best interests and to the detriment of the minor children. It appears that the father has attempted to thwart the rights and visitation of the mother with her children at times. There does not appear to be an attempt to add to or extend visitation between mother and children by John, it must be by the schedule. Telephone communication with the children has been made unnecessarily difficult for the mother for a multiple of reasons given by father. The father fails to recognize any problems or faults in the children and has failed to secure appropriate evaluation and counseling for the boys. He denies all imperfection and wants the children to be his without outside influence or input by the mother.

(c) The primary custodial parent should be changed to Cynthia Kelly. The children should reside together with their mother, Cynthia Kelly and her husband Robert Kelly in West Palm Beach, Florida during the school year as defined by the Palm Beach County Public School System. During vacations, including the extended summer vacation, the children together should have visitation with their father, John Metcalfe, as more fully set forth below, and as recommended by mental health care experts, now and in the future.

(d) With regard to visitation, the undersigned would recommend that the non-custodial parent, John Metcalfe, have alternate weekends with the children. If either parent wishes to take an extended vacation or extended weekend vacation, that should be able to be arranged amicably between the parties. Additionally, both parents should be able to be with the children on their respective birthdays or the day immediately before or after in order to celebrate that event; and if not possible, the parents shall alternate the years of celebration on the birthday.

Additionally, the children should be able to spend Father's Day with father and on his birthday as well as to spend Mother's Day with mother and on her birthday. All major holidays should be amicably divided between the parties trying to give equal access and contact between them.

7. The children need a warm and nuturing environment in order to develop and mature into happy and healthy adults. The court-appointed psychologist, in her report and deposition concludes that the children need extensive psychotherapy and psychoeducational evaluation and therapy. John Metcalfe needs to have extensive parental therapy for himself and for his children. Cynthia and Robert will need parenting counseling and therapy to make an adjustment to the role of full time parents. It is imperative that the psychologist's urging be heeded if these children are to enjoy a healthy childhood and adulthood.

8. The children must be insured by the best medical insurance available for them in light of the recommendation of extensive psychological counseling. This cost should be borne by John Metcalfe as well as the uninsured portion of the psychological counseling with all other costs being split equally by the parties for medical expenses. Child support should be awarded n accordance with the child support guidelines of Florida Statutes.

9. The undersigned makes these recommendations to the Court and requests the Court to consider them in its ultimate findings and orders for custody and visitation orders. The undersigned as well as an associate attorney in the office, Aileen M. Ugalde, have continually communicated with the parents, grandparents, the parties' attorneys, as well as other interested persons, attend hearings and depositions. The undersigned and

his associate have spent well in excess of 204 hours in this matter and costs in the sum of $421.93 which the court can assess a fee and costs against the parties at its discretion.

Respectfully submitted,

illegible
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By: s/ Richard C. Milestein
Richard C. Milestein
Florida Bar No.: 175001

APPENDIX B — EXCERPTS FROM THE RESPONDENT'S BRIEF FILED WITH THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

[page 3] The Court heard from three experts. Dr. Ruth Latterner referred to hereinabove was Court appointed. Dr. Diane Lillesand was called in by the Wife to review test results of the parties and the children on behalf of the Wife, and Dr. Nancy Greenfield who was called in for a like purpose by the Husband.

Both the Husband and Wife were given an MMPI, the results of which should be the same regardless of by whom given. It is graded by computer. (A.III., 44). Dr. Latterner administered the MMPI. Her report of the **Wife** states:

> "Individuals with this profile are often devoid of personality disorder. This individual is apt to be in a category of anxious and fearful personality. People with profiles of this type are often naive and may be lacking in insight. Such individuals tend to make use of defense mechanisms of repression and are unduly conventional and sometimes insecure." (A.I. 1, 2).

Her report of the **Husband's** test, on the other hand, indicated:

> " . . . depicts an individual who responded to test items in a defensive manner and is generally lacking in insight. Persons of the profile tend to be rebellious, immature, irresponsible, egocentric, emotionally unstable, and individuals with this profile are usually associated with deficits with impulse

> control. They are primarily seen as emotionally unstable, passive-aggressive, or to a lesser extent anti-social or narcissistic. A wide variety of acting-out behavior is presented in patients with this profile type. These persons tend to be rebellious toward authority, are impulsive, and are apt to have a history of poor vocational adjustments. These people tend to make good impressions, but after a longer acquaintance their egocentricity becomes apparent. . . . Marital adjustments and difficulties are quite common in individuals with this profile. This is a frequent profile for mothers of problem children." (A.II., 15).

At her January 7, 1993 deposition, Dr. Latterner testified that testing indicated:

> " . . . this profile is encountered in neurotic individuals. . . . Yes, egocentric, emotionally unstable, and almost always seen as character disorders with deficits of impulse control. . . ." (A.III. 47, 48).

Dr. Latterner found the Husband's profile so terrible that she did not want to put everything down in her report for fear that it could influence the Husband and appear that there was no hope for him. She specifically stated:

> "This profile, beyond the mid-20s, this is something that I left out, because I think it is damaging, and I wish nobody knew about it."

Appendix B

> "Beyond the mid-20s, this is a rather enduring and stable personality pattern that is apt to be quite resistant to any significant change, meaning in psychotherapy. I believe that is true, but I think it is destructive to put it down, because that is like giving up." (A.III., 49).

When asked if it was difficult to change this type of personality after one had reached one's mid-20s, Dr. Latterner responded:

> "Yes, and I think it's probably true, but I don't want to cut off all avenues for this man. I want him to have the opportunity of therapy. I don't like putting this in a report. This says to me to give up, and don't try to change . . . so I left it out of the report, because I think it is damaging to him. I don't think it helps one way or the other in the case. I don't think it is appropriate, but I think it is damaging to him . . . I know you will all read the raw data, which makes me feel good, but I left it out because my bottom line is not just to help the children, I would like to help everyone get themselves together, mentally, in this family. (A.III 49, 50).

Dr. Latterner was asked specifically about this case and about custody and the need of the parties for therapy:

> Q. The mother needs ***two*** units on a scale of 10 of therapy and the father needs ***eight***?

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A. RIGHT. (emphasis added). (A.III. 51, 52).

Dr. Latterner felt that the Husband was ***dysfunctional*** and didn't really have a chance to change. She stated specifically:

> " . . . this is what I saw. I saw a father who needs help, who is dysfunctional, because why give a diagnosis, he is dysfunctional, he has problems, and kids who have big problems." (A.III. 54).

Dr. Latterner stated specifically that the Husband needs therapy (A.III. 57), and the Wife and her Husband (Mr. and Mrs. Kelly) don't need therapy (A.III. 83). ***Dr. Latterner stated that the children should remain with their father only due to her strong feeling of continuity.***

She stated that the children, without being questioned, said they wanted to live with their father (much like Mrs. Pope testified to and stated in her report as referred to on Page 9 herein) as follows:

> "David spontaneously stated, 'I want to live with Dad, not Mom.' He further stated, 'I want to visit Mom and Bob, not all the time. He says, 'Be quiet.' Bob never hit me; he says 'be quiet' . . . sometimes . . . Dad spanks me when I be bad. I say bad words like 'cacca, pee' when I say diarrhea . . .' David indicated that he went to Epcot and had a lot of fun recently, and he said, 'Bobby said he'd

> cut his throat and get hurt . . . ' He further stated, 'Bobby doesn't eat to get fat'." (A. 8)

She referred to this parroting again at Trial. (T 1/20/93, 1180).

The above affirms Bob Kelly's testimony about the childrens' lack of weight gain and that the children weighed approximately 30 lbs. at age 3 1/2 and weighed the same at age 5. (T. 1/20/83). The Wife testified that Bobby didn't want to eat because Daddy said he would get fat. (T. 3/8/93, p. 59). Dr. Latterner referred to Bobby twisting his hair in her report. (A.II 10). Mrs. Pope saw same (Page 8 of this Brief), and reference to same was made in the Appellant's Brief as well at Page 12.

There are numerous references to Bobby's hair problem and to pulling same out and twisting it. Mrs. Pope noted it both in her testimony and in a report stating that Bobby wore a hat to conceal his loss of hair (T. 1/20/93, 39 and A.IV 2). The Wife reported Bobby pulling his hair out a fistful at a time to where he was completely bald on one side of his head. (T. 3/8/93, 46 and 54). The Wife, as well, relates to the story of Bobby pulling his hair out. (T. 3/8/93, 46 and 54) as does Mr. Kelly.

Dr. Latterner also stated in her report:

> "A very positive interaction was noted with both Mr. and Mrs. Kelly. Both boys called mother "Mom" and called step-dad "Bob". (A.II., 13).

When asked by Dr. Latterner to draw something funny, Bobby drew:

Appendix B

> A. A volcano with a house, Daddy's house, and Daddy is in the house with a volcano (T. 1/20/93, 113).

Dr. Lillesand's response to the volcano picture was:

> "My hypothesis, based on this picture, is that a major source of the turmoil lies within the home of the children" — "this child resides in. And the person identified in the picture is Dad. He did not draw a picture of his mother's home this way." (T. 8/11/93, 13).

She stated that the Husband's testing showed psychological problems with poor impulse control, conflict with authority, etc. (T. 8/11/93, 14). She then concluded:

> "Well, my review of this file led me to the conclusion that the children have some really serious emotional problems that need to be addressed and a strong hypothesis that these problems are in some way connected with their father." (T. 8/11/93, 18).

When Dr. Latterner asked as to the pictures as a whole, Dr. Latterner stated:

> A. Yes. They are poorly organized. They have a great deal of disorganized emotion. They are disruptive. They are fearful. There is confusion. (T. 1/20/93, 142).

Dr. Lillesand concurred that it was in the best interests of the

children to be with their mother. She also felt, as quoted by the Appellant in his Brief on Page 9:

> "There is a lot of indication in their drawings that their father is very central to their emotional problems. I'm not going to use, just based on just reviewing the data, the word "cause", but he is very strongly tied up with their fears and their anxieties and their overwhelming emotional distress." (T. 8/11/93, 12-13).
>
> "As if the children's emotional problems appear to be centralized on their home environment and their father, and I would change that." (Words added) (T. 8/11/93, 20).

And continuing, on page 13 thereof with the testimony of Cynthia Lee Anctil Metcalfe (herein referred to as "Cindy Lee", the woman Mr. Metcalfe married after he was divorced for the now Mrs. Kelly):

She talked of the Husband's anger and discipline:

> "It depends on the mood he was in. Towards the end, he was in such a mood, the discipline was spankings. A lot of them during the course of the day. They weren't around that much, so that's basically what they got in the morning and received when they got home.
>
> And on the way home, he would literally stop

> in the middle of traffic, very embarrassing to everybody, get out of the car, take one of them out, and just give them a spanking or threaten to leave them. This is the sad part. I hate to get into this part." (A. __, 13).

She recalled a specific incident as to leaving the child . . . almost:

> " . . . He had stopped the car and he put Bobby out of the car and said okay, now I'm just going to leave you. And he closed the car and he just kind of slowly drove away like to put the fear in him. The child actually thought that the father would leave — I'm yelling, John what are you doing. You're torturing these children. You're also holding up traffic. You're going to get us killed. The child might get hit." (A.V., 15).

Cindy Lee repeated the same type of story on Page 16 of her Affidavit. She told of the Husband letting go of the steering wheel, leaving the children off. She told of that happening several times a week. She told of repeated spankings on Page 17 and of the children running to her for security from their father (Page 18). (A.V., 16-18).